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Date: FEB 24 1999

In re: LUIS HUMBERTO GARCIA-LOZANO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jose Salvador Tellez, Esquire
P.O. Box 6658
Laredo, Texas 78042-6658

ON BEHALF OF SERVICE: Jonathan M. Love
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] - Controlled substance violation

APPLICATION: Cancellation of removal

We have jurisdiction over this timely appeal pursuant to 8 C.F.R. § 3.1(b). The Immigration and Naturalization Service has appealed the Immigration Judge's June 22, 1998, decision which found that the charge of inadmissibility under section 212(a)(2)(A)(i)(II), based on a controlled substance violation, was not sustainable; but which sustained the charge of inadmissibility under section 212(a)(2)(C), finding that there was reason to believe that the respondent has been an illicit trafficker in a controlled substance. Having determined that the respondent was removable, the Immigration Judge granted the respondent relief from removal in the form of section 240A(a) cancellation of removal.

The Service appeals both the Immigration Judge's failure to sustain the charge of removal under section 212(a)(2)(A)(i)(II) and her grant of cancellation of removal. The Service argues: 1) that the deferred adjudication of the respondent's drug possession offense was a final conviction for immigration purposes and that the charge of removability under section 212(a)(2)(A)(i)(II) should therefore have been sustained; 2) that the Immigration Judge erred in not pretermitting an application for cancellation of removal because the respondent's conviction for possession of 46 pounds of marijuana is an aggravated felony which renders him statutorily ineligible for that relief; and 3) that even if the Immigration Judge did not err in failing to pretermit the respondent's application for cancellation of removal, she erred in determining that the respondent's equities warranted a favorable grant of discretion.

The respondent has not cross appealed the Immigration Judge's determination that the respondent is removable under section 212(a)(2)(C) because there was reason to believe that the respondent has been an illicit trafficker in a controlled substance based on this record, which includes the testimony of the respondent, and immigration and customs officers, as well as the

report of a field test showing that 46 pounds of marijuana was seized from the respondent's vehicle (I.J. at 6, Exh. 5). Accordingly, the Immigration Judge's determinations in this regard are final.

The record establishes that based on this incident, the respondent pleaded guilty on November 6, 1997, in the District Court for the 49th Judicial District, Webb County, Texas, of the offense of possession of marijuana, a state felony in the 3d degree. On January 12, 1998, the court adjudged further proceedings deferred, and placed the respondent on probation for a period of 6 years (Exh. 3). The section of the Texas statute under which the respondent was convicted is not provided in the record, but there is no indication, and it has not been alleged, that the elements of the applicable statute relate to anything other than simple possession of marijuana. There is also nothing in the record suggesting that the respondent has had any prior drug possession convictions.

I. WHETHER THE RESPONDENT IS REMOVABLE UNDER SECTION 212(a)(2)(A)(i)(II).

With regard to the Service's first contention, we agree that our decision in *Matter of Punu*, Interim Decision 3364 (BIA 1998), is dispositive of this issue.[1] Subsequent to the Immigration Judge's decision in the instant case, we held in *Punu* that under the section 101(a)(48)(A) definition of conviction, a deferred adjudication under section 42.12 of the Texas Code of Criminal Procedure is a conviction for immigration purposes. Accordingly, we find that the respondent is also removable, as charged, under section 212(a)(2)(A)(i)(II) for his conviction of a controlled substance violation, and the Service's appeal will be sustained on this issue.

II. WHETHER THE RESPONDENT IS STATUTORILY ELIGIBLE TO SEEK CANCELLATION OF REMOVAL.

As to the respondent's eligibility for the relief of cancellation of removal, the Service contends that in the Fifth Circuit, the circuit in which this appeal arises, the decision of the Court of Appeals in *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997), requires a finding that the respondent's state felony conviction for possession of marijuana is an aggravated felony, which renders him statutorily ineligible for section 240A(a) cancellation of removal.[2] For the reasons discussed below, we reject the Service's argument that the respondent's drug possession offense, although a felony under Texas law, is an aggravated felony for immigration purposes.

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[1] We note that although our decision in *Punu* was in deportation, rather than removal, proceedings, it interpreted the same statutory definition of conviction that is applicable to the instant case. *See* section 322 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"), codified in section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A).

[2] There has been no issue raised on appeal regarding the respondent's satisfaction of the time requirements of sections 240A(a)(1) and (2).

Relying on the Fifth Circuit's decision in *Hinojosa-Lopez, supra*, the Service renews the argument that we rejected in *Matter of L-G-*, Interim Decision 3254 (BIA 1995). That is, the Service once again argues that a state's designation of the respondent's possession offense as a felony places it within the class of offenses considered to be aggravated felonies as "drug trafficking crimes" as that term is defined in section 924(c) of title 18, United States Code. *See* section 101(a)(43)(B) of the Act. We thoroughly considered the Service's interpretation of the statute in *Matter of L-G-*, on the Service's motion for reconsideration, but affirmed our prior decision in *Matter of L-G-*, 20 I&N Dec. 905 (BIA 1994).

On reconsideration, we concluded that the term "any felony" as used in defining a "drug trafficking crime" in 18 U.S.C. § 924(c)(2) does not include offenses which are state felonies, but which would not be considered felonies under the federal law. Specifically, we determined that "any felony" refers to the class of offenses that are punishable as felonies under the Controlled Substances Act, 21 U.S.C. § 801 et seq.; the Controlled Substances Import and Export Act, 21 U.S.C. § 951 et seq.; or the Maritime Drug Law Enforcement Act 46 U.S.C. App. 1901 et seq. We clarified that a state drug conviction for an offense whose elements do not have any demonstrated nexus to trafficking as that term is commonly defined, is not considered a "drug trafficking offense" for immigration purposes unless *it is punishable as a felony under the federal drug laws. Id.*, slip opinion at 10-11; *affirming Matter of Davis*, 20 I&N Dec. 536 (BIA 1992) and *Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990). We reiterated the importance of applying a uniform federal definition for the term "felony" for the purposes of applying our immigration laws. The full legal analysis and policy considerations for our decision in *Matter of L-G-, supra*, are set forth therein, and need not be repeated here.

Importantly, *United States v. Hinojosa-Lopez, supra*, on which the Service relies for its contention that the respondent's state felony possession offense is an aggravated felony, is a sentence enhancement case. It does not address whether a drug offense that is a felony under state law, but which would be a misdemeanor under the federal law, should be considered an aggravated felony in the context of immigration proceedings. In *United States v. Hinojosa-Lopez, supra*, the Fifth Circuit examined whether a Texas conviction for aggravated possession of marijuana was an "aggravated felony" within the meaning of section 2L1.2(b)(2) of the United States Sentencing Guidelines, 18 U.S.C.A. Under section 2L1.2(2), an alien who unlawfully entered or remained in the United States after having been previously deported after a conviction for an aggravated felony was subject to a 16 level sentence enhancement.[3]

Application Note 7 ("note 7") for section 2L1.2 defined what constituted an aggravated felony for purposes of sentence enhancement under this provision. The pertinent language of note 7 provided that the class of drug offenses considered aggravated felonies for that section included: "any illicit trafficking in any controlled substance (as defined in 21 U.S.C. § 802), including any drug trafficking crime as defined in 18 U.S.C. § 924(c)(2)." Undeniably, this language parallels the section 101(a)(43)(B) of the Act definition of aggravated felony for immigration purposes. We observe that note 7 provided the additional guidance that "[t]he term 'aggravated felony' applies to offenses described. . . whether in violation of federal or state law. . . ." U.S.S.G. § 2L1.2(b)(2), Application Note 7.

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[3] An equivalent provision is now found in section 2L1.2(b)(1)(A) of the Sentencing Guidelines.

Relying on the First Circuit's reasoning in *United States v. Restrepo-Aguilar*, 74 F.3d 361 (1st Cir. 1996), which also defined "aggravated felony" in the context of the applying section 2L1.2(b)(2) of the Sentencing Guidelines, the Fifth Circuit agreed with the First Circuit and other circuits which had considered the issue in the sentence enhancement context, that 18 U.S.C. § 924(c)(2) defines a "drug trafficking crime" as "encompassing two separate elements: (1) that the offense be punishable under the Controlled Substances Act (or one of the other two statutes identifies); and (2) that the offense be a felony." *United States v. Hinojosa-Lopez*, *supra*, at 694, citing *United States v. Restrepo-Aguilar*, *supra*, at 364. *See e.g. United States v. Briones-Mata,* 116 F.3d 308, 310 (8th Cir. 1997); *United States v. Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir.), *cert. denied*, 117 S.Ct. 218 (1996). These circuits considered the second element met if the state considered the offense a felony, even though it was defined as a misdemeanor under the federal law.[4]

However, we point out that in *Matter of L-G-, supra,* we interpreted section 924(c) as referring us to the Controlled Substances Act at 21 U.S.C. § 802(13), *only* for the purpose of determining whether an offense is *punishable* under its provisions as a felony (i.e., by a term of imprisonment of more than 1 year). We recognized that the Controlled Substances Act principally uses the term "felony" in the context of triggering statutory, mandatory sentence enhancement for repeat offenders. We determined that the relevant inquiry when determining whether a drug offense is a drug trafficking crime for *immigration purposes* is whether the offense is punishable as a felony under the *federal* provisions. *Matter of L-G-*, *supra*, slip opinion at 16.

United States v. Hinojosa-Lopez, *supra*, and the other sentence enhancement cases decided by other circuits, do not specifically address when a state felony drug conviction will be considered a drug trafficking crime, and consequently an aggravated felony, for the purposes of applying the Immigration and Nationality Act. Although the First Circuit, in *United States v. Restrepo-Aguilar*, *supra*, on which the Fifth Circuit heavily relied in *Hinojosa-Lopez*, was critical of our decision in *Matter of L-G-*, *supra*, the court was careful to distinguish the sentence enhancement context from the immigration context. *Restrepo-Aguilar*, *supra*, at 366, n. 9.

Only the Second Circuit has squarely addressed our decision in *Matter of L-G-, supra*, in the context of immigration proceedings. In *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996), the court abandoned the position it had taken in *Jenkins v. INS*, 32 F.3d 11 (2d Cir. 1994). In *Jenkins*, the court had interpreted the term "aggravated felony" in the same manner as the sentence enhancement cases discussed above. However, in *Aguirre*, the court was persuaded by our reasoning in *Matter of L-G-* regarding the "undesirability of subjecting aliens to varying

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[4] In *Hinojosa-Lopez*, the Fifth Circuit also cites to the Ninth Circuit's decision in *United States v. Garcia-Olmedo*, 112 F.3d 399, 400-01 (9th Cir. 1997). *Garcia-Olmedo* is factually distinguishable from the other cases cited. In that case the alien was deemed to have been convicted of an aggravated felony because he had 2 prior marijuana possession convictions. The Ninth Circuit determined that the alien had been convicted of a "felony" by applying a federal definition. Specifically, the court found that, under 21 U.S.C. § 844(a), the maximum penalty for a second possession is 2 years, and that it is thus deemed a felony under federal law pursuant to 18 U.S.C. § 3559(a). The Ninth Circuit's decision in *Garcia-Olmedo* is wholly consistent with our decision in *Matter of L-G-, supra.*

consequences in the administration of the immigration laws, depending on differences among state laws as to whether an offense, not a felony under federal law, was nevertheless a felony under some state laws." *Aguirre v. INS*, *supra*, at 317. Accordingly, the Second Circuit reversed its position, adopting the interpretation set forth in *Matter of L-G-*.

We note that the First, Second, and Eight Circuits have each distinguished the application of the aggravated felony definition in the context of interpreting the Sentencing Guidelines from the context of interpreting the Immigration and Nationality Act. *See United States v. Restrepo-Aguilar*, *supra*, at 366; *Aguirre v. INS*, supra, at note 1; *United States v. Briones-Mata*, *supra* at note 2.

Finally, we observe that the application note relevant to defining the term "aggravated felony" for purposes of applying the Sentencing Guidelines has recently been changed. Application Note 1 now states that for purposes of the guideline of section 2L1.2, " '[a]ggravated felony' is defined at 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony." U.S.S.G.§ 2L1.2, Application Note 1 (amended November 1, 1998). None of the circuits have yet addressed whether this change will affect their interpretation of that term in the sentence enhancement context, or whether they may interpret the term differently in the context of immigration proceedings.

In the absence of any direct circuit court precedent directing us to look to state law for the purpose of determining when a drug offense falls within the section 101(a)(43)(B) definition of "aggravated felony," we will continue to follow our precedent in *Matter of L-G-*, *supra*. As we have discussed above, the Fifth Circuit's decision in *United States v. Hinojosa-Lopez*, *supra*, and the other sentence enhancement cases cited, were not decided in the context of immigration proceedings, where a uniform federal approach is critical. *See generally Matter of Roldan-Santoyo*, Interim Decision _____ (BIA 1999). Under our rule in *Matter of L-G-*, *supra*, a drug offense must be considered a felony as defined under the relevant federal law before it will fall within the class of offenses that are "drug trafficking crimes" for the purpose of determining what constitutes an aggravated felony under section 101(a)(43)(B) of the Act. This respondent's simple possession offense would be a misdemeanor under the federal law. Accordingly, we reject the Service's contention that the respondent is statutorily ineligible to seek the relief of cancellation of removal because we find that he has not been convicted of an "aggravated felony" as that term is defined for immigration purposes.

III. WHETHER DISCRETIONARY RELIEF IS MERITED.

However, we do agree with the Service that this respondent has not demonstrated that he is worthy of a grant of cancellation of removal as a matter of discretion. In *Matter of C-V-T-*, Interim Decision 3342 (BIA 1998), we held that the general standards developed in *Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1974), for the exercise of discretion under former section 212(c) of the Act, are applicable to the exercise of discretion under section 240A(a). Accordingly, in exercising discretion, Immigration Judges and this Board will consider favorable equities such as the length of residence in the United States, family ties in this country, evidence of hardship to the respondent and his family if he is removed, service in the armed forces of the United States, employment history, property or business assets, contributions to the community, proof of genuine rehabilitation, and other evidence of good character. *Matter of C-V-T-*, *supra*,

slip opinion at 6. Adverse factors that will be considered include the nature and circumstances of the grounds of removal, the respondent's immigration history, and the nature, recency, and seriousness of any criminal record, as well as any other evidence indicative of the respondent's bad character or undesirability as a permanent resident. *Id.* It is the respondent's burden to demonstrate that he is worthy of a favorable grant of discretion, and as the negative factors grow, the respondent's burden to offset those factors with counterbalancing favorable factors likewise increases. We agree with the Service that the respondent has not met his burden of demonstrating sufficient favorable equities to support a grant of cancellation of removal.

The Service argues that, given the seriousness of the respondent's offense, he should be held to a heightened standard requiring a showing of "unusual or outstanding equities" to counterbalance his criminal history. *Matter of Marin, supra; Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988). While we agree that the circumstances of the respondent's offense are serious, we find that we need not address whether the respondent's offense warrants application of the heightened "unusual or outstanding equities" standard because we find that even under the general standard set forth in *Matter of Marin, supra*, and followed in *Matter of C-V-T-, supra*, this respondent has not presented sufficient favorable equities to support a grant of relief.

The respondent's most significant favorable factor is the duration of his residency in this country. The 36-year-old respondent has resided in the United States since 1982, and he has been a lawful permanent resident since 1990 (I.J. at 10). The respondent is married to a native and citizen of Mexico, and they have two children, ages 2 and 5. The younger child is a United States citizen. However, although there have been multiple visits to the United States, the respondent's wife and children reside in Mexico, as do most of his other family members (Tr. at 133, 141-47). The respondent does have a sister in the United States, but there is no evidence in the record showing that they maintain a close relationship (Tr. at 133-34). After 16 years in this country, the respondent has accumulated as assets a small house and $160 in savings (Tr. at 131, 149). When testifying about his employment, the respondent stated that he is a scaffold builder, describing two jobs in that capacity, one lasting from September 1995 to December 1996, and the other from December 1996 to May 1997 (Tr. at 135). There is documentation in the record of his employment going back to 1995.

Countervailing these positive equities are the nature and circumstances of the grounds of removability and his recent conviction. The Immigration Judge's determination that he is removable under section 212(a)(2)(C) because there is reason to believe that he has been an illicit trafficker in a controlled substance is final. This determination is based on the Immigration Judge's finding that the respondent attempted to smuggle 46 pounds of marijuana into this country. We have also found on appeal that the charge under section 212(a)(2)(A)(i)(II) is sustainable, based on the deferred adjudication of his possession offense based on that incident. The circumstances and recency of the respondent's drug offense are weighty evidence of his undesirability as a permanent resident in this country, and we find that the respondent has not presented sufficient favorable equities to outweigh his negative immigration and criminal history.

In so finding, we note that the respondent's family ties here are not significant, that he has documented only a brief employment history during his long residence, and that his conviction is too recent for him to demonstrate rehabilitation. In this case, we find that discretionary relief is unwarranted, not because of the absence of one or more "unusual or outstanding" equities, but

because even when considering all of the respondent's favorable equities in the aggregate, including the longevity of his residence, they are insufficient to counterbalance the negative factors. Accordingly, we will sustain the Service's appeal from that grant.

ORDER: The appeal of the Immigration and Naturalization Service is sustained.

FURTHER ORDER: The respondent shall be deported from the United States to Mexico pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Immigration and Nationality Act.

Edward R. Grant

FOR THE BOARD